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No. 85-1731

In The

Supreme Court of the United States

October Term, 1986

AUTOMOBILE CLUB OF MICHIGAN,
AUTO CLUB INSURANCE ASSOCIATION,
AUTO CLUB CASUALTY INSURANCE COMPANY,
AUTO CLUB GROUP INSURANCE COMPANY,
and AUTO CLUB LIFE INSURANCE COMPANY,

Petitioners,

v.

CLIFFORD ROBERTS, STANLEY SNYDER,
FRANCIS DOUGLAS STEVENS, DOUGLAS P. CARLAN,
DANIEL PICANO, JOHN ROBBINS, and CARL KOLP,
On Behalf Of Themselves And On Behalf Of The Class
Of All Sales Representatives Of The Defendants
in the Counties of Wayne, Macomb and Oakland,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

WHEN A PURPORTED IMPASSE OCCURS IN THE NEGOTIATIONS FOR A FIRST COLLECTIVE BARGAINING AGREEMENT, MAY THE EMPLOYER UNILATERALLY VOID PRE-EXISTING INDIVIDUAL EMPLOYMENT CONTRACTS BY DEPRIVING A STATE COURT OF JURISDICTION TO ENFORCE SUCH INDIVIDUAL CONTRACTS ON THE PURPORTED GROUNDS THAT THE NATIONAL LABOR RELATIONS ACT, 29 USC § 151 *ET SEQ.*, PREEMPTS SUCH STATE COURT JURISDICTION?

The Petitioners Answer "Yes."

The Respondents Answer "No."

The Michigan trial court Answered "No."

The Michigan Court of Appeals Answered "No."

The Michigan Supreme Court declined review.

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

COUNTER-STATEMENT OF FACTS

At various points prior to 1978, the Automobile Club of Michigan (the "Auto Club") hired the plaintiffs as commissioned Sales Representatives. A.6. At the time of hire, the Auto Club agreed not to discharge or demote the particular Sales Representative without just cause. A.7. In January, 1982, however, the Auto Club did discharge or demote the plaintiffs, claiming that they had

failed to meet certain minimum sales quotas which had first been promulgated in August, 1981. A.7-8. In a four-count complaint, the plaintiffs alleged, inter alia, that the Auto Club had breached its contract with them, since violations of the minimum sales quotas did not constitute cause under the individual employment contracts with the Auto Club. A.7.

In response to the plaintiffs' complaint, the Auto Club moved for accelerated judgment under Michigan's General Court Rule 116.1(2). In relevant part,[1] the Auto Club asserted that state court jurisdiction over the breach of contract claim was preempted by the National Labor Relations Act, 29 USC § 151 *et seq.* (the "NLRA" or "the Act"), because the sales quotas had been unilaterally implemented by the Auto Club following an impasse in collective bargaining with the Michigan AAA Sales Association. That union had been certified on February 9, 1978 — that is, after the individual plaintiffs and the Auto Club had consummated their individual contracts of employment. A.6. It was subsequently decertified.

In considering the Auto Club's motion for accelerated judgment, the state courts, as is proper under Michigan procedure, assumed that the well-pled allegations of the plaintiffs' complaint were true. A.8, 21. On the basis of those assumptions, the trial court denied the Auto Club's preemption claim. After granting an application for leave to appeal from this interlocutory order, the Michigan Court of Appeals unanimously affirmed. The Court of Appeals then denied a motion for rehearing

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[1] The Auto Club asserted nine other grounds purportedly requiring dismissal of all or part of the plaintiffs' complaint. The order at issue on this petition did not reach those other grounds. As of this date, there has been no ruling on any other aspect of the Auto Club's motion.

and the Michigan Supreme Court denied the delayed application for leave to appeal because it was "not persuaded that the questions presented should now be reviewed by this court." A.2.

REASONS FOR DENYING THE WRIT

This Court should deny the writ for two reasons. First, as will be shown below, the precise issue presented here is exceedingly narrow — so narrow, in fact, that it has *never* arisen before. And second, the principle petitioners champion — *i.e.*, the supposed right of a party to ignore its own prior contractual commitments — has been definitively repudiated by this Court on several occasions.

I.

Petitioners do not dispute that the enforcement of individual contracts for employment has long been with the states. *Perry* v *Sinderman*, 408 U.S. 593, 602 n.7 (1972). Nor do petitioners contend that the mere advent of a union would disturb these contracts. Nor, for their part, do respondents dispute that a collective bargaining contract would ordinarily supersede individual agreements. *J.I. Case* v *NLRB*, 321 U.S. 332 (1943). The dispute here is limited to one extremely narrow issue: the ability of the employer to void pre-existing individual employment contracts after a union has been certified and has bargained to impasse but before it has reached even a first collective bargaining agreement.[2]

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[2] This case does not present the different question of an employer's power to repudiate pre-existing individual contracts after the expiration of one or more collective bargaining agreements. *Cf. J.D. Alexander* v *Standard Oil Co.*, 53 Ill. App. 3d 690, 368 NW2d 1010 (5th Dist. 1977).

Petitioners suggest that the decision below "threatens to severely dislocate national labor policy."[3] (Pet. at 12) And yet neither petitioners nor respondents have uncovered a single other case from any jurisdiction in the last forty years, which even addresses the issue of post-certification, pre-first-contract enforcement of valid individual employment contracts. Nor is that surprising, for it is unusual for an employer to have individual contracts with employees and it is truly extraordinary for an employer to then use an impasse in collective bargaining as the occasion for breaching those contracts.

In fact, the complete dearth of lower-court precedent on point is highlighted by petitioners' incorrect claim that the decision below conflicts with *National Metalcrafters*

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[3] Petitioners make much of the fact that Michigan, along with several other states, has recently changed its substantive requirements for finding binding individual contracts for employment. (Pet. at 10-11) For example, written and signed bilateral agreements are no longer required. *Toussaint* v *Blue Cross*, 408 Mich 579, 292 NW2d 880 (1980).

This observation, while correct, has absolutely no bearing on the federal question posed here. The question here is whether state court enforcement of pre-certification individual contracts is preempted in the absence of a first collective bargaining agreement. The state law regarding what sort of evidence will be required to establish the existence of an individual contract is simply irrelevant.

Moreover, the petitioners are simply wrong in asserting that "[i]f the decision below is allowed to stand, juries, not the NLRB, will become the final arbiter as to whether . . . an employer permissibly exercised its NLRA economic self-help measures in response to a good faith bargaining impasse." (Pet. at 11-12) Should the present case go to trial on plaintiffs' *Toussaint* claim, the fact finder would be asked to determine whether petitioners' pre-certification statement or conduct gave rise *to an enforceable contract of employment*. No NLRA questions of "good faith" or "impasse" or "self-help" would be implicated in the state court suit.

Finally, while it is not relevant here, petitioners in fact far overstate the significance of *Toussaint*. That case clearly leaves employers the option of not making contractual commitments to employees, and that option is being utilized more and more frequently. *See, e.g., Reid* v *Sears, Roebuck & Co.*, __ F2d __, 122 LRRM 2153 (6th Cir 1986).

v *McNeil* (*"Keystone"*), 784 F2d 817 (7th Cir 1986). In *Keystone*, a number of employees attempted to use an Illinois law to compel payment of benefits provided for in a collective bargaining agreement which had expired and which the employer contended he had lawfully modified following a bargaining impasse in such a way as to eliminate the obligation to pay the benefits in question. The Seventh Circuit held that the employees' attempt to use the state law to determine rights under the agreement was preempted by section 301 of the Labor-Management Relations Act of 1947, 29 USC § 185, and by the branch of the labor preemption doctrine formulated in *San Diego Building Trades Council* v *Garmon*, 359 U.S. 236 (1959).

Neither of the grounds on which the court relied in *Keystone* is applicable here. Section 301 cannot preempt the instant case for the simple reason that in the present case respondents asked the state to enforce, not a collective bargaining agreement, but pre-certification individual contracts, which are traditionally subject to state jurisdiction. Moreover, an argument based on *Garmon* is unavailable — and petitioners have properly refrained from raising such an argument — because there is no allegation that the employer's conduct here is either protected or prohibited by Section 7 or Section 8 of the NLRA.

After exhaustive research, the petitioners *and* the respondents have found only one other lower-court precedent which is even related to the questions presented here. *See J. D. Alexander* v *Standard Oil Co.*, 53 Ill. App. 3d 690, 368 NW2d 1010 (5th Dist. 1977). As here, the court concluded that otherwise enforceable individual contracts did not become unenforceable merely because the employer had bargained to impasse with the union.

Alexander, however, did not address the precise issue presented here, since it did not involve pre-first contract negotiation and since it involved the relatively rare situation where the collective bargaining agreement incorporated individual "side agreements." Even so, *Alexander* illustrates both points of respondents' position: the issue presented is very narrow, and the principles for resolving that issue are well-established in this Court's prior decisions.

II.

As the Court held last year, the purpose of the Wagner Act was to remedy "[t]he inequality of bargaining power between employees who do not possess . . . actual liberty of contract, and employers who are organized in corporate or other forms of organization." *Metropolitan Life Ins. Co.* v *Massachusetts*, ___ U.S. ___, 85 LEd 2d 728, 749 (1985) [quoting 29 USC § 151].

Consistent with that purpose, the Court in the early years of the Wagner Act, twice struck down employers' attempts to use individual contracts as a means to avoid reaching a collective agreement. *National Licorice* v *NLRB*, 309 US 350 (1939); *J. I. Case* v *NLRB*, *supra*. In those cases, the Court carefully noted that an employer could not use collective bargaining as an excuse to unilaterally void whatever individual contract rights which employees might have obtained. *Id.* Insofar as petitioners now argue that respondents had forfeited their right to enforce individual contracts when they selected a bargaining representative (Pet. at 8-9), that argument is foreclosed by these two seminal decisions of this Court.

In particular, in *National Licorice*, *supra*, the National Labor Relations Board had struck down the employer's attempt to use individual contracts as a shield against collective negotiations. As a remedy, the Board ordered

all such contracts voided. While affirming the basic Board decision, the Court very carefully noted the continuing role of individual employment contracts in industries covered by the NLRA and modified the Board's order so as not to ". . . foreclose the employees from taking any action to secure an adjudication upon the [individual] contracts . . ." *National Licorice* v *NLRB, supra,* 309 U.S. at 365.

Four years later, in an opinion by Justice Jackson, the Court unanimously reaffirmed the continuing validity of individual employment contracts in the absence of a collective bargaining agreement. *J. I. Case* v *NLRB,* 321 U.S. 332 (1943). As Justice Jackson was an early architect of the preemption doctrine,[4] the courts below quite properly paid special attention to his words:

> "Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, *not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment,* because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue to work after a collective bargaining agreement expires and, despite negotiations in good faith, *the negotiations may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern." J. I. Case* v *NLRB, supra,* 321 U.S. at 336-337 (emphasis added).

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[4] *See Garner* v *Teamsters,* 346 U.S. 485 (1953).

Only three years ago, this Court relied extensively on Justice Jackson's opinion in *J. I. Case* to reaffirm the continuing vitality of individual employment contracts in industries covered by the NLRA and to reject the argument that the NLRA created some privilege to unilaterally void such contracts. *Belknap* v *Hale*, 463 U.S. 491, 500, 506-507, 511-512 (1983). In *Belknap*, as here, the employer sought to avoid state court jurisdiction by claiming that state breach of contract suits would "upset the delicate balance of forces established by federal law" and should therefore be preempted under *Machinists* v *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). In *Belknap*, as here, the employer claimed that it should be allowed to use its "economic weapons" free from any restraint imposed by its prior promises.

The *Belknap* Court found "mystifying" the employer's argument that state law should not "burden" the employer's "economic weapons" by enforcing the employer's otherwise valid promises. *Belknap* v *Hale*, *supra*, 463 U.S. at 500. While *Belknap* involved different plaintiffs and a different "economic weapon" (economic replacements), the employer here is advancing precisely the same argument and the result is equally mystifying. The employer seeks to convert an act designed to assure employees "actual liberty of contract" into a license for an employer to unilaterally breach its own voluntary, pre-existing contracts with employees.

Petitioners attempt to justify this perverse result by suggesting that the employer's claimed right to unilaterally implement an offer contravening pre-existing individual contracts derives, somehow, from the Taft-Hartley Act. (*See* Pet. at 5, 12) But this is not the case, for the employer's right to take unilateral action was recognized well before Taft-Hartley. *See, e.g., H. J. Heinz* v *Labor Board*, 311 U.S. 514, 525-526 (1941); *NLRB* v *Sands*,

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306 U.S. 332 (1939); *NLRB* v *Jones & Laughlin*, 301 U.S. 1, 45 (1936). As the trial court held, the employer's right to take unilateral action derived from neither the Wagner Act nor Taft-Hartley:

> ". . . although the employer's right to implement unilaterally his last good faith offer may be somewhat curtailed by the operation of Section 8 of the NLRA, see, *BiRite Foods, Inc.*, 147 NLRB 59 (1963), yet his right to do so essentially emanates from the common law, entrepreneurial right of an employer to run his business." A.37.

As such, the common-law right of the employer is limited by the common-law rights of employees:

> "As such, the employer's common law right to implement unilaterally his last good faith offer must be seen as being also limited by an employee's common law right to enforce his contract of employment. Disputes regarding such common law rights of employers and employees ought to be and traditionally have been resolved in State courts." A.37.

The plaintiffs here claim that years and, in some cases, decades before the certification of a collective bargaining representative, the Auto Club voluntarily entered into certain contractual commitments with them. As this Court stated in *National Licorice, J. I. Case* and *Belknap*, the employer may not convert the NLRA into a means for unilaterally voiding those pre-existing contractual commitments. There is no need now for this Court to reconsider those very sound decisions, especially in view of the fact that the precise issue presented here has not arisen before and is unlikely to arise elsewhere again.

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CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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